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ABSTRACT

This chapter discusses the question, To what degree is the school board limited by the requirement that it not be arbitrary or capricious in deciding not to renew a probationary teacher? When teachers have been notified that their employment contracts will not be renewed, they are responsible for initiating a review of the decision. If the school has a procedure for internal review, the employee must request this review before seeking judicial review. Cases are cited that show that the courts have found a nonrenewal "arbitrary and capricious" if it is made in bad faith, is based on the teacher's exercise of First Amendment or other constitutionally protected rights, is unrelated to the educational process or to a reasonable educational objective, is justified by reasons that are wholly unsupported in fact, or is found to be an abuse of discretion. The states' statutes (sometimes board policy) establish the school board's basis for teacher renewal. To define the issue, both cases in which the board decision was found to be arbitrary and cases in which the claim was rejected are reviewed. When the school board has acted in good faith for reasons it thinks probably will improve the instructional programs--which includes not renewing an "average" teacher in order to look for a better teacher--its decision will generally stand. (MLF)

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Arbitrary and Capricious Nonrenewal Decisions

Robert E. Phay

Every spring, school boards must decide whether to renew the contracts of their probationary teachers. A school board has a legal and moral responsibility to appoint and reappoint only the best teachers it can. And in searching for the best, a board may choose not to reappoint an "average" or "satisfactory" teacher, when it believes that a better one can be found. For this reason, a nonrenewal is not an arbitrary act; in fact, a nonrenewal may be necessary if the board is to discharge its duty to put the very best teacher it can hire in the classroom.

In 1982, the author examined the right of the board to not renew an average teacher when it thinks it can find a better one.[1] That article raised but did not examine a more general question: to what degree is the school board limited by the requirement that it not be arbitrary or capricious in deciding not to renew a probationary teacher? This article will consider that question — the type of statutes that impose this limitation and court decisions that have ruled on whether a nonrenewal was arbitrary.

The Responsibility for Challenging the Nonreappointment and the Burden of Proof

Before examining the cases, it should be noted that when teachers have been notified that their employment contracts will not be renewed, they are responsible for initiating a review of that decision. Furthermore, if the school has a procedure for internal review,[2] the employee must request this review before he seeks judicial review. In an Alabama case, a federal district court addressed the question of who bears the burden of initiating a hearing. Citing the United States

1. *See* Phay, *Seeking Excellence: Not Reappointing an "Average" Teacher in Order to Employ a Better Teacher*, 4 Educ. L. Rep. 357 (1982).

2. For a recommended board policy on nonreappointment, see R. Phay, Nonreappointment, Dismissal, and Reduction in Force of Teachers and Administrators: Proposed Board Policies (1982). It is highly desirable that procedures separate from the regular teacher grievance procedure be provided for nonreappointments, just as a separate procedure is used for discharge for cause.

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Supreme Court's decision in *Board of Regents v. Roth*,[3] the court said that teachers who believe that their nonrenewal is impermissible must assert that claim and request a hearing in order to protect their "due process right." It is elemental, the court said, that some opposition to the nonreappointment be made before any obligation is placed on the school to observe due process requirements.[4] As the Mississippi Supreme Court recently said in rejecting a teacher's claim that her nonrenewal was arbitrary, "so long as the nonreemployment decision is not based upon an improper reason, the school board does not have to justify its decision for nonreemployment."[5]

The law also is clear that a teacher who alleges that a nonrenewal decision was based on an impermissible reason has the burden of proving that allegation. The Fifth Circuit Court of Appeals, in a case in which a school district refused renewal of two probationary faculty so that it could "upgrade its faculty and academic standing," said that "neither the burden of going forward nor the burden of proof shifts to the state until it has been established by the complainant" that the nonrenewal was based on his exercise of constitutional rights.[6] Moreover, the Supreme Court said in *Mt. Healthy v. Doyle*[7] that even if a faculty member can show that the board's decision not to reappoint was based in part on conduct of the teacher that is constitutionally protected, its decision will be sustained if it can show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[8]

The Fourth Circuit applied the *Mt. Healthy* ruling in *Mayberry v. Dees*,[9] a case involving the nonreappointment of a teacher who was up for tenure. The court said that a teacher cannot claim that his nonreappointment was unconstitutional merely by showing an exercise of first amendment rights, followed by a denial of tenure. That approach wrongly ignores the "manifold other requirements" to be satisfied before tenure is granted, some of which are independent of the candidate's qualifications.[10] "[I]f the possibility of retaliation

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3. 408 U.S. 564 (1972).

4. Stewart v. Bailey, 396 F. Supp. 1381, 1383 (N.D. Ala. 1975).

5. Tanner v. Hazlehurst Mun. Sep. School Dist., 427 So. 2d 977, 980, (Miss. 1983). *See also* Cooner v. Board of Educ., 663 P.2d 1002, 1005, (Ariz. App. 1982), in which the court said that it would not review the reason given for the nonrenewal unless the reason was "so unreasonable, arbitrary and capricious and about which reasonable men would not differ." Arizona law requires that a reason be given for the nonrenewal.

6. Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 206 (5th Cir. 1971). *Accord* Adams v. Campbell County School Dist., 511 F.2d 1242, 1246 (10th Cir. 1975).

7. 429 U.S. 274 (1977), digested in 8 Sch. L. Bull. 11 (April 1977).

8. 429 U.S. at 287.

9. 663 F.2d 502 (4th Cir. 1981).

10. *Id.* at 518.

were all Mayberry had to prove to allow a jury to find in his favor, there would be no practical way to deny tenure to anyone." If that were the case, the court said, the distinction between probationary and tenured employment "would largely evaporate."[11] The court also made clear that past satisfactory performance does not justify an inference that the teacher should now be given tenure. The court rejected this argument, saying that no favorable inference "is to be drawn from previous satisfactory, annually renewed probationary service."[12]

Arbitrary Nonrenewal

In teacher nonrenewal decisions, the courts also have had to decide whether a nonrenewal of a probationary teacher's contract was arbitrary or capricious. Generally, a nonrenewal will be found "arbitrary and capricious" if it is made in bad faith,[13] is based on the teacher's exercise of first amendment or other constitutionally protected rights,[14] is unrelated to the educational process or to a reasonable educational objective,[15] is justified by reasons that are wholly unsupported in fact,[16] is based on reasons that are frivolous or trivial,[17] or is found to be an abuse of discretion.[18]

Statutes

The states' statutes (sometimes board policy) establish the school board's basis for teacher renewal. These statutes vary, and thus what is arbitrary in one state may not be arbitrary in another. For example, some states (like Alabama and Alaska) permit the board to refuse renewal for any reason other than a constitutionally impermissible

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11. *Id.* at 519.
12. *Id.*
13. Jinkerson v. Lane County School Dist., 531 P.2d 289 (Or. Ct. App. 1975).
14. Stoddard v. School Dist. No. 2, 590 F.2d 829 (10th Cir. 1979); Shatting v. Dillingham School Dist., 617 P.2d 9 (Alaska 1980).
15. Drown v. Portsmouth School Dist., 451 F.2d 1106 (1st Cir. 1971); Lewis v. Tucson School Dist. No. 1, 23 Ariz. App. 154, 531 P.2d 199 (1975). *See* Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965, 999 (1969).
16. Keith v. Community School Dist., 262 N.W.2d 249 (Iowa 1978). *See also* Unified School Dist. v. Dice, 612 P.2d 1203 (Kan. 1980), in which nonrenewal was upheld because "sufficient" evidence supported the decision. Sufficient evidence, the court said, varies according to the situation, "although it need be only enough to prevent the decision from being totally arbitrary and capricious." *Id.* at 1211.
17. Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Shatting v. Dillingham School Dist., 617 P.2d at 14; Dobervich v. Central Cass Pub. School Dist., 302 N.W.2d 745 (N.D. 1981).
18. Fay v. Board, 298 N.W.2d 345 (Iowa Ct. App. 1980) (weak support for abuse of discretion).

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one.[19] California, however, requires that the nonrenewal relate to the welfare of the schools and pupils.[20] Connecticut statutes require that the nonrenewal be for one of the six reasons for which a tenured teacher may be discharged,[21] although the board has no burden to prove the reason — the teacher must prove that the given reason was not the real reason.[22] And North Dakota grants instant tenure: before a teacher may be denied renewal, the school administrator must submit written reasons for the nonrenewal and then substantiate those reasons at a hearing on the nonrenewal.[23] Although none of these statutes give a school board unfettered discretion in its renewal decisions, most states give the board broad discretion to determine what is in the best interests of the school district and what is the best way to achieve the board's education goals.[24]

The North Carolina statute provides that the board may refuse to renew the contract of any probationary teacher "for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons."[25] In the fourteen years since the North Carolina Teacher Tenure Act was enacted, there have been only six litigated teacher nonrenewals in which an attempt was made to apply the "arbitrary and capricious" standard contained in that law. Two of these suits involved the federal courts and a claim that the statute established

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19. Ala. Code § 16-24-2 (1977); Alaska Stat. § 14.20175(a) (1982). Alaska's statute, unlike Alabama's, also required the board to provide a written statement of the reasons and an "informal" board hearing if the teacher requests them. South Dakota also requires written notice of the reasons and a board hearing on the nonrenewal. S.D. Codified Laws Ann. § 13-46-10.2 (1982).

20. Cal. Educ. Code § 44949(d) (1978). *See* Griggs v. Board of Trustees, 37 Cal. Rptr. 194 (Cal. Ct. App. 1964), for nonrenewal case that established the test that there must be a reasonable relationship between the cause for nonrenewal and the welfare of the Schools. *Id.* 194.

21. Conn. Gen. Stat. Ann. § 10-15(a) (Supp. 1983).

22. *See* Devlin v. Bennett, 213 A.2d 725 (1965), for a full discussion of the Connecticut statute.

23. N.D. Cent. Code § 15-47-38(5) (Supp. 1983).

24. *See, e.g.*, Donaldson v. Board of Educ., 320 A.2d 857, 859 (N.J. 1974) ("The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance, for there are many unrelated but nonetheless equally valid reasons why a board, having had the benefits of observation during the probationary period, may conclude that tenure should not be granted"). *See also* Jinkerson v. Lane County School Dist., 531 P.2d 289 (Or. Ct. App. 1975) ("[I]t is apparent that [the good-faith requirement] is a very narrow limitation on a school district's exercise of professional judgment in personnel matters . . . ."); Dobervich v. Central Cass Pub. School Dist., 302 N.S.2d 745 (N.D. 1981) ("[T]he exercise of discretion [by the board] is not subject to review by the courts except in a case of clear or gross abuse of discretion, clear violation of law, fraud, bad faith or the transcending of the board's legal authority").

25. N.C. Gen. Stat. § 115C-325(m)(2) (1983).

rights protected by the federal Constitution. The federally based claim was clearly rejected in 1977, when the Fourth Circuit found in *Sigmon v. Poe*[26] that the statute establishes no "property" interest under the fourteenth amendment. (The fourteenth amendment due process clause applies only when the school is taking either a property or liberty interest of the plaintiff. The teacher had argued that the statute's prohibition against an arbitrary nonrenewal created a "property" right for the probationary teacher that required a due process hearing to show that the board's nonrenewal was not arbitrary.) In the other decisions that reach a conclusion on whether the cause of the nonrenewal was arbitrary, the courts have said that a board can refute such an allegation by showing any plausible educationally related basis for the decision. But if the board acted frivolously or whimsically or has sought to limit constitutionally protected speech, a statutory violation usually will be found.

Oregon's teacher-renewal standard is similar to North Carolina's. It provides that the "board may, for any cause it may deem in good faith sufficient, refuse to renew the contract of any probationary teacher."[27] The Oregon Court of Appeals interpreted the provision in 1975, although it declined to define "good faith" precisely. It said that the good-faith requirement is a very narrow limitation on a school district's exercise of professional judgement in personnel matters and may mean only that a "nonrenewal cannot be based on a constitutionally impermissible reason."[28] The court also made clear that the burden is on the teacher to plead and prove that the decision not to renew was made in bad faith. It suggested that a bad faith decision might be defined as one that is tainted with fraud, malice, dishonesty, corruption, collusion, wrongful motive, or intentional wrongdoing.[29] It further noted that the fact that others would have decided differently on the same evidence does not establish bad faith. The board is responsible for making personnel decisions, and the court may not substitute its judgment if a reasonable basis exists for the board's decision.

To define the issue better, cases in which the board decision was found to be arbitrary and then cases in which the claim was rejected are reviewed below.

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26. 564 F.2d 1093, 1096 (4th Cir. 1977. *Accord* Sutton v. Marianna School Dist., 573 F. Supp. 159 (E.D. Ark. 1983).

27. Or. Rev. Stat. § 432.835(2) (1983) (emphasis added). The "good faith" requirement is essentially the equivalent of the arbitrary and capricious standard.

28. Jinkerson v. Lane School Dist. 178, 531 P.2d 289, 292 (Or. Ct. App. 1975).

29. *Id.* at 292.

Arbitrary Action Found

Courts have found nonrenewals to be arbitrary when the true reason is unjustified discrimination, personal bias, or prejudice. In Kentucky, the Supreme court held that it is arbitrary and discriminatory to refuse to re-employ a teacher because of his or her place of birth.[30] The school failed to show that people born in the county were more loyal to the school system than residents of other counties, and the nonrenewal was found to be both arbitrary and unconstitutional.[31] In California, the state court of appeals reinstated a probationary teacher saying that a school board's refusal to rehire her because she was overweight (5 feet, 7 inches and 228 pounds) was unrelated to her effectiveness as a teacher.[32] And the Tenth Circuit Court of Appeals, in *Stoddard v. School District No. 2*,[33] held that a school board may not base nonrenewal on a contrived reason. The denial was actually based, the court said, on the prejudices of a small, predominantly Mormon community in Wyoming; thus the decision not to renew demonstrated bad faith and also was unconstitutional. The court said that the real reasons for the teacher's nonrenewal were her obesity, her failure to attend church, the location of her trailer home, her card-playing, and rumors that she was having an affair, rather than the board's claimed reasons that she inadequately disciplined her students, kept an untidy classroom, and was generally an unsatisfactory teacher.

An arbitrary nonrenewal also was found in a case that involved an illegal attempt by school officials to circumvent the North Carolina Tenure Act's three-year limit on probationary status.[34] When a high school teacher and head coach came up for a tenure decision, the principal conditioned a recommendation for renewal on the teacher's signing a statement that his probationary period would be extended to a fourth year. The teacher refused to sign; and the principal and the superintendent recommended nonrenewal. When the board voted not to renew, the teacher sued, arguing that the board had been arbitrary and capricious in violation of the tenure statute. The trial court dismissed the action, and the teacher appealed.

The state appellate court reversed. It said that if the board's decision of nonrenewal was based solely on the two administrators'

30. Johnson v. Dixon, 501 S.W.2d 256 (Ky. 1973).

31. *See also* Head v. Haywood County, No. A-C-75-69 (W.D.N.C. July 15, 1976) (new residents of county who had strongly criticized the superintendent were awarded $2,500 in damages by a jury that found sufficient evidence to support an allegation of an arbitrary nonrenewal).

32. Blodgett v. Board, 97 Cal. Rptr. 406 (Cal. Ct. App. 1971).

33. 590 F.2d 829 (10th Cir. 1979).

34. 260 S.E.2d 135 (1979).

recommendation not to reappoint, then the board had not acted arbitrarily. But if the board's action had been based on the teacher's refusal to sign the statement — a statement intended to circumvent the tenure statute — then the board had acted arbitrarily. The court remanded the case to the trial court to determine on which basis the board's decision had been made.

A North Carolina case, *Johnson v. Branch*,[35] illustrates the fact that even when the state statutes contain no prohibition against arbitrary nonrenewal, courts will reinstate teachers when the nonrenewal has no educationally related basis. The Fourth Circuit decided this case in 1966, before the specific statutory prohibition against arbitrary nonrenewal was enacted. The court held that a school board's action in not renewing a teacher's contract for various reasons characterized by the court as "minor" was "arbitrary and capricious" and therefore illegal.

The case arose in a rural eastern North Carolina community that had become a focal point of a voter registration drive in which the teacher, a black with twelve years of service in the school system, was active. Moreover, her husband and her father were both candidates for public office. The civil rights activity produced an emotionally charged situation, and in the spring of 1964, Mrs. Johnson was given a letter listing seven infractions of school rules by her. She later was notified that she would not be reappointed. None of the infractions pertained to the quality of her classroom work; they included such items as her being fifteen minutes late to supervise a night athletic contest, arriving late to school (although before classes began), not furnishing a written explanation for missing a PTA meeting, not standing in her class doorway to supervise class changes, and not keeping her cabinets neat. The teacher had been rated above average or excellent for all twelve years of her service, and her principal had recommended her for reappointment. The school board, however, chose not to renew her contract, purportedly for the reasons stated in the warning letter.

Johnson sued, alleging that the board had acted arbitrarily and capriciously in penalizing her for exercising constitutionally protected rights. The trial court dismissed the suit, but the Fourth Circuit reversed, holding that the minor infractions were neither individually nor collectively sufficient to justify failure to renew a teacher with an outstanding twelve-year record. It said:

The statute gives discretion to the school board in deciding wheth-

35. 364 F.2d 177 (4th Cir. 1966).

> er or not to continue the employment of a teacher. Discretion means the exercise of judgment, not bias or capriciousness. Thus it must be based on fact and supported by reasoned analysis .... [T]he infractions enumerated in the March 10th letter were neither individually nor collectively such as to justify failure to renew the contract of a teacher with the plaintiff's record of twelve years .... [T]he action of the school board was arbitrary and capricious.[35]

Although no proof was advanced that the board's decision was retaliation for the civil rights activities of the teacher and her husband, the court noted that the decision had been made in "the highly charged emotional background of a small eastern North Carolina community in the throes of a civil rights campaign .... " Since the school's charges were so trivial, the court said, the only reasonable inference was that Mrs. Johnson's contract was not renewed because of her civil rights activity. It considered the two issues together (alleged arbitrary act and constitutional violation) and found that the board had been arbitrary and also had denied the teacher her constitutionally protected rights.

Thus a court may find a decision to be arbitrary if that decision is based on reasons unrelated to a teacher's competence, is trivial, is factually unsupported, or is unconstitutionally discriminatory.[37]

No Arbitrary Action Found

Courts have usually upheld nonrenewals, rejecting teachers' claims of arbitrary action. For example, they have upheld nonrenewal decisions challenged as being arbitrary when the board showed that the decisions were made because the teacher had not followed administrative regulations, was insubordinate, or had demonstrated unprofessional conduct. Examples of insubordination and unprofessional conduct include failure to maintain a "plan book" adequately despite repeated requests to do so,[38] failure to follow administrative regulations by not submitting an individual educational program on the date requested,[39] refusal to teach on a legal holiday that has been designated a school day,[40] and use of abusive language when dealing

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36. *Id.* at 181-82.

37. *But see* Reed v. Edgeley Pub. School Dist., 313 N.W.2d 775, 780, 1 Ed. Law 1285, 1290 (N.D. 1981), in which the North Dakota Supreme Court said: "We do not believe that testimony indicating that one member of the board desired to 'get rid of Reed' would be grounds for concluding that the Edgeley School Board acted arbitrarily." *See also* Fercho v. Montpelier Pub. School Dist., 312 N.W.2d 337, 341 (N.D. 1981).

38. Jinkerson v. Lane County School Dist., 531 P.2d 289 (Or. Ct. App. 1975).

39. Cervantez v. Morenci Pub. Schools, 605 P.2d 462 (Ariz. 1979).

40. Skeim v. Independent School Dist., 234 N.W.2d 806 (Minn. 1975).

with students.[41]

Nonrenewal has been held to be not arbitrary even when it is based on personality conflicts or poor working relationships with co-workers or superiors,[42] or when one member of the school board is out "to get rid" of a teacher.[43] Problems in dealing with students — such as lack of classroom control,[44] inconsistent handling of discipline,[45] inadequate supervision,[46] and lack of confidentiality when dealing with student records[47] — have been successful defenses against a teacher's allegation of arbitrary nonrenewal. A showing of poor classroom performance also refutes a claim of arbitrary nonrenewal. For example, teachers' claims of arbitrariness have been rejected when it was shown that their classroom instruction was disorganized;[48] or that students' performance and motivation were poor;[49] or that proper criticism, suggestions, or new teaching methods were rejected,[50] or that performance was unsatisfactory.[51] Finally, some courts have said that it is not arbitrary to not renew a probationary teacher whose performance is generally satisfactory when the board believes that it can find a better teacher.[52]

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41. Shatting v. Dillingham School Dist., 617 P.2d 9 (Alaska 1980). *See also* Frison v. Franklin County Bd. of Educ., 596 F.2d 1192 (4th Cir. 1979) (demotion for reading to class a student note that contained three vulgar colloquialisms.) *But see* Lindros v. Governing Board, 510 P.2d 361 (Cal. 1973) (reading aloud a short story that contained a vulgarity failed to establish "cause" related to school welfare and therefore was not basis for nonrenewal).

42. Jinkerson v. Lane County School Dist., 531 P.2d 289 (Or. Ct. App. 1975); California Fed'n of Teachers v. Oxnard Elementary Schools, 77 Cal. Rptr. 497 (Cal. 1969); Homan v. Blue Ridge School Dist., 405 A.2d 572 (Pa. Commw. 1979); Boyd v. Mary E. Dill School Dist. No. 51, 631 P.2d 577 (Ariz. 1981); Drown v. Portsmouth School Dist., 451 F.2d 1106 (1st Cir. 1971).

43. Reed v. Edgeley Pub. School Dist., 313 N.W.2d 775, (N.D. 1981).

44. Devlin v. Bennett, 213 A.2d 725 (Conn. 1965). *Accord* Kudasik v. Board, 455 A.2d 261 (Pa. 1983).

45. *Id.*

46. Shatting v. Dillingham School Dist., 617 P.2d 9 (Alaska 1980).

47. Homan v. Blue Ridge School Dist., 405 A.2d 572 (Pa. Commw. Ct. 1979).

48. Devlin v. Bennett, 213 A.2d 725 (Conn. 1965); Homan v. Blue Ridge School Dist., 405 A.2d 572 (Pa. Commw. Ct. 1979); Busker v. Board of Educ., 295 N.W.2d (S.D. 1980); Chappell v. Brunswick County Bd. of Educ., No. 82 CVS 293 (N.C. Super. Ct., 1983).

49. Shatting v. Dillingham School Dist., 617 P.2d 9 (Alaska 1980); Dobervich v. Central Cass Pub. School Dist., 302 N.W.2d 745 (N.D. 1981).

50. Boyd v. Mary E. Dill School Dist., 631 P.2d 577 (Ariz. 1981).

51. Herr v. Adams-Arapahoe Joint School Dist., 503 P.2d 353 (Colo. Ct. App. 1972).

52. *See, e.g.*, Branch v. School Dist., 432 F. Supp. 608 (D. Mont. 1977). In this case the teacher was apparently considered to be above average in teaching ability; but the court said that selecting teachers was a discretionary action and if the board felt that it could "get a better teacher to complement the system," it would not interfere with the board's judgment. *See also* Bridger Educ. Ass'n v. Board of Trustees, 678 P.2d 659 (Mont. 1984), in which the court interpreted the Montana statute that a teacher who is to be nonrenewed be furnished a written statement "of the reasons for termination of

The law on what constitutes an arbitrary and capricious nonrenewal is well stated in a 1972 Indiana case, *Tilton v. Southwest School Corporation*,[53] which involved the nonrenewal of an "average" teacher so that a better teacher might be sought. The court defined an arbitrary and capricious action as a "willfull and unreasonable action, without consideration and in disregard of the facts or circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action."[54] In this case, the board said that it did not renew the teacher's contract because "the instructional contribution made by [the teacher] to the educational program was not of a quality sufficiently high to merit [his] continuation as a teacher in the [school district] .... Further it was determined that the educational program in the social studies area could be improved by [the teacher's] replacement."[55]

The trial court held that the board's action was not "arbitrary and capricious," and the appeals court affirmed. The appeals court indicated that teacher evaluations would be considered in reviewing the decision, but as long as some basis existed that would lead a reasonable person to decide not to renew, the decision would not be found "arbitrary and capricious."[56] The court said that the substance of the reasons given, if true, was sufficient to support a decision to not renew; in this case, the principal's evaluations of the teacher supported those reasons. The court also pointed out that besides the interests of the teacher and the school, the interests of the school children involved had to be considered. The board is best equipped to decide what is in the children's best interests and how to achieve the district's educational goals.

Courts also have rejected claims of arbitrary nonrenewal when the school board has nonrenewed a teacher, actually hired as an assistant athletic coach, in order to give a new head coach a free hand in choosing his staff. A federal district court in Alabama upheld a nonrenewal after the school admitted this to be the reason for the nonrenewal.[57] The North Carolina Court of Appeals, however, recently reversed a trial court and ordered a teacher reinstated against this claim, although the board denied that it had acted arbitrarily

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employment." A divided court said that board notice that it could find a better teacher" was insufficient to meet the statutory requirements. Instead it must indicate those areas where the teacher's performance was less than it could expect from another teacher.

53. 281 N.E.2d 117 (Ind. Ct. App. 1972).
54. *Id.* at 122.
55. *Id.* at 120.
56. *Id.* at 122-23.
57. 517 F. Supp. 686 (M.D. Ala. 1981).

saying that its sole reason for not renewing the appointment was that the school superintendent had recommended nonrenewal.[58]

Only about ten courts have dealt with the board's right to not renew an average teacher who has done nothing wrong, when that nonrenewal is for the purpose of seeking a better one. Except when subterfuge was involved, these courts have adopted the *Tilton* rationale: schools have a legal responsibility to put the best available teacher in the classroom; thus they do not act arbitrarily when they do not reappoint an "average" teacher so that they may meet that objective.

Conclusion

School boards' power to employ and reemploy teachers is given on the assumption that it will be used to hire and reappoint only the best teachers and administrators that the board can employ. For approximately a third of a school's probationary teachers, the decision to renew will confer permanent tenure. But whether tenure is at issue or not, few restraints are placed on the board's right to say that the employment ends with the current contract. For that decision to be arbitrary or capricious, an "abuse of board discretion" must exist. As the above cases demonstrate, this abuse exists when the decision is made for petty or fickle reasons that have no justifiable educational basis, or when the decision is unconstitutionally discriminatory. But when the school board has acted in good faith for reasons it thinks *probably* will improve the instructional programs — which includes not renewing an "average" teacher in order to look for a better teacher — its decision will generally stand.

58. No. 847SC91 (N.C. App. Ct. 1984).